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Supreme Court of the United States

October Term, 1967.

No. 1319

WILLIAM P. HAGERTY,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

Petition for Certiorari to Review Judgment of Supreme Court of Louisiana, No. 48617, "State of Louisiana v. William P. Hagerty".

G. W. GILL, SR.,
GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
F. IRVIN DYMOND,
National Bank of Commerce Bldg.,
New Orleans, La.
Attorneys for Petitioner.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, William P. Hagerty, prays that a writ of certiorari issue to the Supreme Court of Louisiana to review the judgment of that Court rendered on December 11, 1967 and as to which a rehearing was denied on Jan. 15, 1968. The proceedings below are entitled "State of Louisiana v. William P. Hagerty" No. 48617 of the Docket of the Supreme Court of Louisiana.

CITATIONS TO OPINION BELOW.

The opinion below is reported in 205 So.2d 369.

JURISDICTIONAL STATEMENT.

Petitioner was for several years the Public Administrator for the Parish of Orleans. As such, he was entrusted with the handling and custody of vacant estates. He was charged by information with theft of certain interest on moneys entrusted to his care, the total, of a period of years, being $5,283.13. The alleged "theft" of said interest occurred during a period of years when there was no provision under Louisiana law for the investment or deposit at interest of funds held by the Public Administrator. After a trial by jury petitioner was convicted and sentenced to three years in the penitentiary.

The statutory provision relied upon as conferring jurisdiction upon this Court for the issuance of certiorari is Title 28, United States Code, Sec. 1257 (3). The Supreme Court of Louisiana is the highest Court of the State and the judgment herein complained of is a final judgment.

QUESTIONS PRESENTED.

1. Were the constitutional rights of petitioner as to due process and equal protection of the laws violated by reason of the vague definition of the offense in the Louisiana statute defining "theft?"

2. As a companion issue to Question I, *supra,* were the constitutional rights of petitioner as to due process and equal protection of the laws violated by reason of the failure of the Court to charge the jury properly as to the elements of the offense?

3. Were the constitutional rights of petitioner as to due process of law violated by reason of the refusal of the trial Court to permit defense counsel to read to the jury crucial statutory provisions relative to the obligations of public officials entrusted with funds and refusal to instruct the jury as to such statutory law?

STATUTES INVOLVED.

1. The Due Process clause and the Equal Protection of the Laws clause of the Constitution of the United States;

2. The Louisiana "theft statute," LSA-R.S. 14:67.

STATEMENT.

Petitioner, William P. Hagerty, was for a period of years discussed below, the Public Administrator for Parish of Orleans, State of Louisiana. The duties of this office involve the administration of vacant estates, i.e., the estates of those who die in the Parish (County) without apparent heirs. Petitioner Hagerty was a former member of the Louisiana Legislature, having been one of the last political survivors among the New Orleans "Old Regulars". The

post of Public Administrator was a political plum, appointive by the Governor. As a "holdover" appointee from a former gubernatorial administration, Hagerty became a prime target over a period of years for the Times-Picayune, the only surviving newspaper in New Orleans and a publication which for generations has sought to lend its columns to pious projects of public protection whilst simultaneously feathering the nests of friendly birds of political prey. The Times-Picayune, over a period of years had laid down a barrage of criticism of the manner in which Public Administrator Hagerty ran his office criticizing everything from the cost of coffins to the fees paid friendly lawyers assisting Hagerty in liquidating the remnants of vacant estates after their erstwhile owners had been buried. To add further to his woes, Hagerty became an isolated target for the District Attorney of Orleans Parish, Honorable Jim Garrison, at a time just before the Shaw conspiracy case burst upon a puzzled world.[1]

The substantive criminal law of Louisiana has been under continual revision since 1928 and the present "theft statute", LSA-R.S. 14:67 is considerably broader than any common law concept of "theft". Said statute provides, in its first paragraph:

> "Theft is the *misappropriation* or taking of *anything of value* which belongs to another,

[1] As a matter of fact two of counsel for petitioner sought and obtained a continuance of the hearing before the State Supreme Court of Louisiana on the ground that one of them, Mr. Dymond, was busily engaged in his vendetta with Mr. Garrison in the Shaw case. No. 198-059, Criminal District Court, Parish of Orleans.

either without the consent of the other to the misappropriation or taking, *or by means of fraudulent conduct, practices or representations.*" (Emphasis added.)

On its very face, therefore, the present theft statute is a sort of hybrid partaking of both the nature of common law larceny and embezzlement. The definition of the "theft" would seem to eliminate an outright unlawful "taking" (the common law basis of larceny) because it alternatively covers "misappropriation" (the common law basis of embezzlement). Moreover, the statute expressly eliminates as an element of the offense the lack of consent of the owner. It would seem to cover a situation where the owner had consented to the taking but his consent had been procured "by means of fraudulent conduct, practices or representations."

As noted below, the State Supreme Court has long interpreted the statute as not even requiring any "misrepresentation" as long as some general sort of fraud was shown.

By a strict and technical construction, therefore, an imaginative and ambitious District Attorney could prosecute for "theft" a host of citizens whose supposed offenses could never before have been brought within the generally accepted notions of any established crime. Any action which resulted in financial gain by one citizen at the expense of another could be presented as a "theft", provided some show

of either *misrepresentation* or "fraud" could be found. With so awesome a weapon of ambiguous power in his arsenal the incumbent District Attorney, Mr. Garrison, set out to prosecute for "theft" citizens who could never have been prosecuted before for any criminal offense. For example, before the current prosecution was commenced, he convicted the head of a loan company for "theft", said "theft" consisting solely of supposedly hidden charges of interest.[2]

Although some ten bills of exception were reserved at trial we rely here only upon those bills pertinent to the three "Questions Presented" above. The bills (documented below) include a motion for bill of particulars, motion to quash or demurrer, motion in arrest of judgment, motion for new trial, refusal to give special charges relative to the nature of the offense and refusal to permit admission of evidence bearing upon the lack of guilty knowledge by petitioner. The errors complained of here are interrelated in that they bear directly upon:

(a) The vagueness of the statute; and

(b) The practical difficulty of defending oneself before a jury against an ambiguous statute in the absence of adequate explanation and protection by a trial Court alert to the dangers of a "political

[2] This was done in State of Louisiana v. Sarpy, No. 193,609, Sec. B of the Criminal District Court for the Parish of Orleans in which attacks were made upon the constitutionality of the statute. The appeal is still pending.

lynching" (which this prosecution was).

In response to a motion for bill of particulars the State had amended the information so as to charge that: (R. 20, Vol. I)

"between the nineteenth day of March, 1958, and the fourth day of October in the year of our Lord, one thousand nine hundred and sixty-two with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, committed a theft of FIVE THOUSAND TWO HUNDRED AND EIGHTY THREE DOLLARS AND THIRTEEN CENTS ($5,283.13) etc."

The factual background for this most unusual prosecution bears little resemblance to any classic concept of "theft", either common law or statutory.

The sole "property" which was the subject of the alleged theft over a period of years was the interest upon funds of which petitioner, as Public Administrator, had custody. These funds, while in his custody, actually belonged to no one, either the estate or the potential heirs. Petitioner was required to maintain custody of the funds of vacant estates for a period fixed by law. If any heirs made an appearance and proved up a claim to the estate the funds, after deduction of fees and costs, were paid to such heirs. If no heir appeared, then the money was transferred to the State, but, even after such transfer to the State, this did not bar absolutely a claim by the heirs for

their share of the money. Thus, while the funds entrusted to petitioner were *potentially* the property of the State, they were also *potentially* the property of the unknown heirs, if any. Title to said funds, therefore, while in the custody of petitioner, was in a state of suspense. Moreover, under the Louisiana law as of the period involved in this prosecution, *there was no provision whatever as to whether petitioner was required to invest said funds at interest or simply turn over the original amount, either to the State or the heirs.* Under the law as it then stood, petitioner was free to put the money in a savings account, keep it in a vault or bury it in a tin can in his backyard, so long as he turned over the original amount to the party ultimately entitled to it.

This situation, therefore presented what might be termed a "double hiatus", i.e., there was no law as to where or how the money should be invested and there was no law as to what happened to the interest should petitioner elect to invest the money. In this confused state of affairs, Petitioner Hagerty elected to invest the funds in time certificates which, over a period of years, had earned some five thousand dollars, the identical amount which the State herein styles as the subject of "theft" when it became commingled with his office bank account.

As will be noted in the opinion of the State Supreme Court (Appendix A) the most troublesome problem presented was the issue as to who owned the interest which was the sole subject of the al-

leged "theft". Both under the common law concept of theft as well as under the current Louisiana statute, there could be no theft unless there was an owner. The State Supreme Court solved this enigma by holding that, although as of the time of the offense, no one owned either the funds or the interest, the State had an "inchoate" right to the interest.

The "inchoate" theory of the State Supreme Court bears only secondarily here as to the unconstitutionality of the statute. But it is part of the package of ambiguity which the State labeled "theft" and placed in the lap of a jury which convicted the defendant below. Ambiguity was the prevailing vice in this prosecution. The statute itself was and is ambiguous. The information, both as originally drawn and as amended (R. 18 and 20, Vol. 1) was ambiguous in failing to specify that the sum which was the subject of theft was only the interest on money in his custody, as distinguished from the fund itself in his control. Weird procedural errors were permitted at trial (noted below) whereby, by denial of requested charges, the jury was wholly uninformed as to what must be proven in order to convict defendant. Finally, after permitting the prosecution to cross examine petitioner at length as to his knowledge of the law in regard to his responsibilities, the defense was not even permitted to rebut this by informing the jury of highly pertinent statutes bearing upon the good faith of petitioner in depositing at interest the funds in his custody when the law at the time was utterly silent as to what he should do with

said funds and what must be done with any interest accumulated during the period in which title to the funds was not vested in anyone, either the State or the heirs. These errors are presented below as denials of due process but the prime basis upon which this writ may be granted lies in the vagueness of the statute, as we will now show.

REASONS FOR GRANTING THE WRIT.

The principal reason for granting of certiorari and the one of most general national interest is the invalidity of the statute under which petitioner was prosecuted. The applicable rule is well stated by this Court in the 1963 decision by this Court in *Wright v. Georgia*, 373 U.S. 284, 10 L.Ed.2d 349, 83 S.Ct. 1240, in which under different facts Your Honors declared: (at p. 356, column 2 of 10 L.Ed.2d)

> "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. Lanzetta v. New Jersey, 306 U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618; Connally v. General Constr. Co., 269 U.S. 385, 70 L.Ed. 322, 46 S. Ct. 126; United States v. L. Cohen Grocery Co., 255 U.S. 81, 65 L.Ed. 516, 41 S.Ct. 298, 14 ALR 1045; see also United States v. National Dairy Products Corp., 372 U.S. 29, 9 L.Ed.2d 561, 83 S. Ct. 594."

An analysis of the varying factual situations under which the foregoing rule has been applied to vague

statutes would serve no useful purpose here. The rule is clear: If the statute does not give fair warning as to what it makes criminal then the statute is invalid as denying due process of law.

It seems inconceivable that the average Louisiana business man could be deemed to know that, under the terms of R.S. 14:67 he could be prosecuted as a thief under the technical application applied here. The statute as presently applied makes it possible for an ambitious and aggressive District Attorney to prosecute as a criminal any business man who derives "anything of value" from another provided some sort of deception can be read into the business transaction.

The Supreme Court of Louisiana in 1955 gave its blessing to the broadest possible interpretation of this 1942 theft statute in *State v. Dabbs*, 84 So.2d 601, 228 La. 960 when it declared: (at page 603, col. 2 of 84 So.2d)

> "These cases were decided prior to the legislative enactment of LSA-R.S.14:67 (1942) which broadened the concept of theft to include all offenses of larceny, embezzlement and obtaining by false pretenses, and thereby abolished the distinction between these common law concepts.* * * The legislature enacted LSA-R.S.14:67 *so that it would include not merely representations, but any fraudulent conduct practices or representations. The theft statute was thus designed to enlarge its scope from that of representations only as a basis for theft by fraud and*

to extend the concept so as to include fraudulent conduct or practice." (Emphasis added.)

The context in which the above language was used was in distinguishing between "representations" as distinguished from the broader term "fraudulent conduct" which might relate to either the past or future.

Thus, under the sweeping interpretation given this statute by the State Supreme Court, "fraudulent conduct" is a catch all phrase which can make criminal practically any transaction whereby one party gets a financial advantage over another. *The requirement that there must be "misrepresentation" is eliminated* and the instant case provides a clear cut example of how widely this ambiguous statute may be applied. Here Hagerty did not misrepresent anything to anybody. There is not a scintilla of evidence in the record that he ever concealed from the State or anyone else the fact that he was investing the funds in his custody at interest. Nor was there any shred of evidence that he ever concealed from the State or anyone else the fact that, over a period of years, the interest from the money (the sole subject of "theft" here) was being deposited into his bank account from which he paid not only official expenses but other expenses relating to his insurance business.

HOW QUESTION PRESENTED BELOW.

The question as to the vagueness of the statute, as bearing upon its invalidity, was presented below, with related issues as follows:

Bill of Particulars, R. 26, Vol. 1; Demurrer and Motion to Quash, R. 32, Vol. 1; Motion in Arrest of Judgment, R. 47, Vol. 1; Motion for New Trial, R. 60, Vol. 1.

THE DENIAL OF SPECIAL CHARGES AS AMOUNTING TO DENIAL OF DUE PROCESS.

In addition to being faced with a vague information which we contend is invalid because of its ambiguity, petitioner was denied certain special charges which were essential to inform the jury of certain essential elements of the offense, particularly the fact that, at the time of the purported theft, the funds were actually the property of *someone*. Our objection to the denial of this essential charge was made subject of our specification of error No. I in the State Supreme Court, and had been preserved in the trial Court by Bill of Exceptions No. 7, R. 85, Vol. 1. As will be noted in said Bill, the requested charge (R. 36, Vol. I) read as follows:

> "One of the indispensable elements of the crime of theft as defined by our statute is that the property which is alleged to be the subject of the theft belong to a person other than the defendant. Consequently, in the case at bar, unless the State proves to your entire satisfaction, and beyond a reasonable doubt, that the sum of $5,-294.09 which it alleges was the subject of the theft, or any part thereof, belonged to a person other than this defendant, it would be your duty to return a verdict acquitting this defendant of the crime of theft.

There is no law in the State of Louisiana requiring that the State Treasurer or the Public Administrator for the Parish of Orleans deposit, at interest, funds which come into the possession of the Public Administrator for the Parish of Orleans in his capacity as such. This being the case, neither the State of Louisiana nor other owners of such funds have a legal right to have such funds deposited at interest. *Thus, should it be proven that the Public Administrator for the Parish of Orleans deposited funds. which were in his custody and possession and obtained interest on said deposit and then custody and possession and obtained interest on said deposit and then converted said interest to his own use, while this action may be an unauthorized use of the moneys deposited at interest, the conversion of the interest to his own use would not constitute the crime of theft for the reason that said interest was never owned or possessed by the State of Louisiana as alleged in the Bill of Information.*

This situation could be analogized to one in which a person takes an automobile belonging to another, intending to return it, and eventually returning it, but while he has that automobile of another in his possession unauthorizedly leases same at a rental of $10 per day. While he may be guilty of unauthorizedly using this automobile of another, he would not be guilty of theft of the profit which he derived from the rental thereof." (Emphasis added.)

FUNDS DID NOT BELONG TO STATE.

Beyond the shadow of a doubt none of the funds, from which the interest was derived, belonged to the State at the time of the alleged theft. True, the State had a residual interest in said funds if something was left over, if the true owners of said funds did not appear in time to claim their money. But, in a proper legal sense, this *could not be equated with ownership of one thin dime* of the money under Hagerty's control. For, if the heirs of various decedents all appeared and claimed their respective shares of the money being held by Hagerty as Public Administrator, then the State would be left holding a big bag of nothing.

Thus, the denial of this special charge, we submit, was highly prejudicial and the Court did not even attempt to cure the error in his general charge.

Throughout all of his Per Curiams to this and similar related Bills, the Court studiously avoided the main issue which is simply this:

IF PETITIONER WAS CHARGED WITH THEFT OF INTEREST WAS IT NOT NECESSARY TO DETERMINE THAT SOME PARTY WAS THE LAWFUL OWNER OF THAT INTEREST?

Here we perceive the significance of Act 7 of 1963 and Act 37 of 1964 (the exclusion of which forms the basis of a later bill of exception). IT WAS NOT UNTIL PASSAGE OF ACT 7 of 1963 THAT THERE WAS

ANY EXPRESS AUTHORITY FOR THE INVESTMENT OF PUBLIC FUNDS IN INTEREST BEARING "TIME CERTIFICATES", OR MORE THAN A YEAR AFTER THE TAIL END OF THE ALLEGED CONTINUING OFFENSE. (See text of Act 7 of 1963 as set forth in photostat exhibit, R. 39.)

It was only when that statute became effective that the law expressly provided anything as to the ownership of this type of interest. Thus, in Section 3 of the 1963 Act it was declared:

"Section 3. The interest *earned by the State Treasurer* on investments herein authorized shall be credited to the General Fund of the state." (Emphasis added.)

Please note that even this 1963 Act applied only to investments by the State Treasurer, *but even so this change took place more than a year after the period for which the offense is charged.* (Emphasis added.)

Next, by Act 37 of 1964 (some two years after the alleged tail end date of the offense) the Legislature broadened the provision above noted by making it applicable to the State Treasurer and "State agencies".

Assuming arguendo, therefore that the 1964 Act applied to Hagerty it did not take effect until more than two years after the alleged offense. Until that time he had a better right to the interest which he had virtually created than either the State or any unknown heirs.

Thus, without the essential idea presented as to WHO OWNED THE INTEREST, the jury was not even given a chance to weigh the possibility that Hagerty had as good or better title to the interest money than anyone. The prejudicial effect is obvious: The jury was led to believe that it could properly convict Hagerty for theft because he was greedy or overreaching without ever finding that he actually took *something that already belonged to somebody else.*

The foregoing we submit is a denial of due process of law in any State and in any Court. A similar error was committed in the failure of the Court to give a special charge to the effect that, should the jury see fit, the accused might be found guilty of the lesser offense of unauthorized use of movables. This error is set forth in Specification of Error Number Three in the Supreme Court of Louisiana and is based upon Bill of Exceptions No. 3, R. 38.

REFUSAL TO ALLOW THE DEFENSE TO INFORM JURY AS TO CHANGES IN STATE LAW RELATIVE TO INVESTMENT OF FUNDS.

This error was presented by Bill of Exceptions No. 5, R. 79, Vol. 1, and formed the basis of Specification of Error No. 4 in the State Supreme Court.

As noted earlier, at the time of the alleged continuing thefts of interest, there was a hiatus in the law and no provision existed for the handling of these funds, i.e., either as to how they should be kept or to whom the earned interest would accrue if invested.

This hiatus in the law was not cured until well after the period of the offense by Acts 7 of 1963 and 37 of 1964.

Thus, the fact that the Legislature found it necessary to pass a law to "take over" the interest on funds deposited by an agency, is highly persuasive of the conclusion that, before passage of such statute, the interest did not belong to the State. Indeed, when we consider the nature of the funds deposited by the State agency, (assuming arguendo that Hagerty's operation was even covered by the two amendments) the validity of the two statutes would seem questionable. For, applied to funds of the type being administered by Hagerty, there would be no logical basis on which the State could claim any equitable right to the interest. Until the funds were formally forfeited to the State by the passage of time and failure of anyone to make a claim, the State had no right to any part of said funds, either principal or interest. At the eleventh hour, so to speak, it would be legally possible, though not probable, that every last unknown heir of the lot would come wheeling into Court demanding their rights to the money left by good ole Cousin Fud and Minnie Mudd. And, if they were entitled to the money they certainly had a better title to the interest than the State itself, which had already taken a share for administrative costs.

When defense counsel Dymond sought to inform the jury, in argument, of the nature of Act 7 of 1963 and Act 37 of 1964, discussed above, there was an ob-

jection and he was not permitted to inform the jury that the law had been changed. (R. 358.)

In addition to showing *what the law actually was* at the time of the alleged offense (i.e., prior to the passage of the first of the above, Act 7 of 1963) the jury should have been informed of the hiatus existing in said law *as bearing on intent or guilty knowledge by defendant.*

This is particularly true when we consider how Hagerty had been pilloried by the State and badgered by the fact that he was a former member of the Legislature, that he was one of the co-authors of the new Code of Criminal Procedure (along with a small army of others who would find themselves hard put to distinguish between the Criminal Code and the Morse Code).

Thus, this denial of the vital information to the jury as to major legislative developments was doubly prejudicial: It kept the jury from having a fair view of the legislative changes as bearing on *who actually owned the interest* at the time of the alleged offense and it prevented their knowing anything about the two statutes which would certainly have had a bearing upon Hagerty's state of mind and intent. This was a major error and cannot be justified under any theory conceivable. The Court's suggestion that the two statutes were irrelevant because they went into effect after the dates of the alleged offense. (R. 81, Per Curiam) misses the point entirely.

CONCLUSION.

We respectfully submit that any of the above described errors would warrant a reversal as denial of due process and particularly that the first error, the invalidity of this ambiguous and far reaching criminal statute is of sufficient national interest to warrant certiorari. In the hands of an ambitious and imaginative District Attorney such as Mr. Garrison undoubtedly is, such a statute is a veritable Sword of Damocles hanging over the heads of many citizens. As noted above, said sword began to swing wildly before the present case was created. In the *Sarpy* case, *supra,* footnote 1, amid the acclaim of the good grey Times-Picayune, the Orleans Parish District Attorney successfully created a theft case out of what was simply an overcharge and he did so while publicly admitting that he was stretching the statute in order to do so. He simply announced publicly that he was going to jail those "silk shirted Shylocks" who prey upon poor people and convicted Sarpy of theft under this same statute. Finally, we note that, upon the conviction of petitioner in the instant case the Times-Picayune congratulated itself the next day as having started the crusade of criticism of Hagerty which climaxed with his now being scheduled to go to the penitentiary for three years. This was a political lynching if there ever was one and the denial of constitutional rights to due process is glaring. In addition to everything else, it should be noted that the mainstay of the Supreme Court of Louisiana opinion here (Appendix A) is that the State had an "inchoate"

right to the interest. But there is not a line in the record to show that, even conceding, arguendo, the validity of so nebulous a theory, THE FUNDS UPON WHICH THIS "INCHOATE" RIGHT WERE TO BE ULTIMATELY APPLIED DID NOT ACTUALLY BELONG TO HEIRS WHO SHOWED UP AS CLAIMANTS. If so the State would have had no "inchoate right" to interest on somebody else's money.

For the foregoing reasons petitioner prays that a writ of certiorari issue to the Supreme Court of Louisiana in the above cause.

G. W. GILL, SR.,

GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,

F. IRVIN DYMOND,
National Bank of Commerce Bldg.,
New Orleans, La.,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, G. Wray Gill, of counsel for petitioner and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing petition for certiorari has been served upon opposing counsel, the Attorney General of Louisiana and the District Attorney for the Parish of Orleans, by mailing same, postage prepaid and properly addressed to their respective offices on April ..., 1968.

April ..., 1968.

G. WRAY GILL.